operator's costs, including a substantial return on investment. Therefore, a nominal rate approximating an operator's incremental costs should be presumed to be a fair rate, unless the operator can prove otherwise.

Consider, for example, the case of TELEMIAMI. We have been carried for a long time, and it would be unfair to treat us as if we imposed new opportunity costs on the operators that carry us -- we have an established viewership and in some cases may have led subscribers to subscribe to cable in the first place. Indeed, we are the only local leased access cable programmer to meet the threshold for listing the Nielsen ratings. It is impossible to accurately measure the benefits we may have brought to the operators and the benefits we have brought may very well outweigh any opportunity cost.

We believe we should pay a nominal rate to cover any incremental costs we impose by falling outside the operators' usual arrangements with programmers. We are even prepared to pay a nominal rate even though the Commission's formula overcompensates operators for their operating costs and we do not collect a license fee, unlike most other programmers. We respect the Commission's concern with being fair to cable operators and believe we can compete even on an unlevel playing field. But for us to pay anything more would be unfair, unless an operator could show that there were indeed substantial opportunity costs resulting from our occupancy of a channel.

The foregoing is also true of new channels that are not already carried on a system, which require an existing channel to be removed or a dark channel to be activated. The opportunity cost formula does not give the leased access provider any credit for adding value to the operator's system, but this is not necessarily true -- and the Commission cannot

quantify what that value is or what the difference is between that value and the so-called opportunity cost.

In addition, an operator must carry its fixed per-channel operating costs no matter what is on the system, and if the channel is dark, the operator will carry all of those costs without any reduction for the value added by the programming or any leased access payments. The only true cost to the operator is the expense of accommodating the leased access provider by having to put tapes in a machine at certain times, or making technical accommodations needed to run the programming, such as installing a direct link to the programmer's studio. Larger, specified costs such as installing a direct link can be handled by direct negotiation between the parties. Smaller, routine costs associated with dealing with the leased access programmer can be approximated with a nominal amount, such as $0.01 or $0.05 per subscriber per month[4] -- although we also note that at a certain point the incremental marginal cost associated with running a leased access program has a limit, so the fee should be capped. Otherwise, the per subscriber rate on a very large system would still be prohibitive, and would probably far exceed the true incremental cost.

Thus, we propose that the Commission modify the proposal in the FNPRM to set a nominal fee of between $0.01 and $0.05 per subscriber per month to serve as a proxy for all costs over and above the operator's operating costs. Operators who receive a request for leased access would be required to quote the nominal rate, unless they could justify a higher rate under the cost/market formula. Before quoting the higher rate, operators would be

[4] The Center for Media Education and the Consumer Federation of America have submitted evidence to the Commission suggesting that the annual incremental costs to a cable operator for a full-time leased access channel is only $783.

required to rebut the presumption that the nominal rate recovered the operator's costs. The methodology set forth in the FNPRM would then be used to calculate a different rate, if the Commission found that the operator had met its burden of proof. Upon making that showing, the operator would be free to quote the higher rate to potential leased access programmers.

Once again, this approach is fair because it leaves the matter entirely in the discretion of the operator, who is the party with access to the information needed to compute the rate. Any other method imposes costs and obligations on the leased access programmer, who has no information and much less bargaining power than the operator.

We believe that in fact the Commission will face very few petitions from operators to justify higher rates.

Finally, TELEMIAMI supports the concept of relying on a market-based rate under which potential and existing leased access programmers bid against each other to fill leased access space, once an operator has met its leased access set-aside obligation. Nevertheless, the Commission must be ready to regulate this area in other respects. TELEMIAMI's experience indicates that cable operators are not above engaging in sham transactions in an effort to undercut a leased access programmer. Thus, the Commission must ensure that all potential bidders in such cases are truly unaffiliated programmers and have no undisclosed connections or contacts with the operator. For example, it would be very easy for an operator to collude with a programmer (or so-called programmer) to jack up the bidding and then drop out. Or perhaps the bidder would not drop out, but would receive valuable

incentives in its contract - such as the right to use the operator's logo in its advertising -- that were denied to other bidders.

IV. THE COMMISSION MUST REGULATE THE TERMS AND CONDITIONS OF CARRIAGE TO PREVENT OPERATORS FROM UNREASONABLY DENYING ACCESS.

The FNPRM properly recognizes that the Commission's responsibility extends beyond merely establishing a method of setting leased access rates, and the FNPRM begins to address a few of the terms and conditions of carriage to which leased access programmers may be subject. The Commission, however, needs to do more; otherwise, even if the Commission develops a fair and affordable rate-setting mechanism, operators will continue to suppress leased access by refusing to negotiate reasonable terms.

A. The Commission Should Fully Exercise Its Authority to Regulate Terms and Conditions of Carriage.

No matter what is done about setting maximum rates, operators will continue to be able to ignore their obligations simply by making the other non-rate terms of their proposed contracts with leased access programmers so unreasonable or onerous as to discourage potential programmers from entering into them. Operators will simply take unreasonable stands on such things as the term of an agreement, the operator's termination rights, or the amount of a security deposit, and essentially refuse to negotiate.

While such behavior certainly exposes the operator to the risk of being found to have acted in bad faith, that is a risk the operator might well be willing to take. The reason is that many programmers lack the funds or the time to become embroiled in one proceeding after another about each negotiating stance of the operator. In short, a great many

programmers will be deterred by the prospect of having to prove, again and again and at their own expense, the operator's lack of good faith.

The Commission therefore should, at a minimum, expressly order that operators shall not demand terms from leased access operators that are more burdensome or expensive to comply with than the terms of any contract for carriage entered into by the operator with any other person. Operators should also be expressly required to negotiate all the terms and conditions of carriage in good faith, taking into account the relative bargaining power of the parties.

The most practical approach over the long run may be a form of common carriage, under which operators will offer all programmers the same terms on a form approved by the Commission.

B. Programmers Should be Selected on a First-Come, First-Served Basis.

We agree with the Commission's tentative conclusion that programmers should be selected on a first-come, first-served basis. The only discretion an operator should have is in negotiating lease terms. If a leased access programmer is willing to agree on terms, that should be the end of the matter. This should apply in all cases, including cases in which the operator is choosing between a full-time lease and a part-time lease. Otherwise, operators will have incentives to delay one party or another. The Commission must always bear in mind the established hostility of cable operators towards leased access, both in theory and in practice. Leased access channels should be as closely analogous to common carriage as possible, with the operator exercising as little discretion as possible.

C. Operators Should Be Required to Place Leased Access Programming on the Basic Tier or the CPS Tier with the Highest Penetration.

We concur with the Commission's tentative conclusion that leased access programmers should have the right to be placed on a tier. as opposed to being carried as a premium service. As the Commission notes, allowing an operator to force leased access programming to be carried as a premium service would sharply limit the programmer's access to subscribers. It would mean the end of any advertiser-supported leased access programmer like TELEMIAMI, and would not advance the goals of the Cable Act. In addition, the general reluctance of cable operators to carry leased access programming indicates that the discretion of cable operators should be limited in this regard.

We also agree with the tentative conclusion that the BST and the CPST with the highest subscriber penetration qualify as genuine outlets. Those should be the only tiers on which an operator may be permitted to place leased access programming, unless the leased access programmer consents. and the rate for the channel is adjusted accordingly. The fact is that the BST and CPST are the tiers that people think of when they think of cable programming and are surely the tiers Congress had in mind. If the Commission adopts any lesser standard, it will merely invite dispute about exactly how many subscribers do subscribe to a given tier and whether that tier meets the test or not.

In addition, the FNPRM's concern about giving the operator flexibility is not valid. for several reasons. First, the CPS tier with the highest subscriber penetration generally carries a large number of channels and is designed to appeal to a broad spectrum of viewers. Thus, as a practical matter, unless the operator is intentionally trying to marginalize leased access programming, the main CPS tier is probably the best place for the programming.

Second, cable operators should not be allowed to treat leased access programming as something they can use for their own ends, unless they have the programmer's consent. Indeed, were operators to do so, they would have to do so on the basis of the content of the programming. Once again, the Commission should keep the common carrier-like model in mind, and avoid any scheme that gives the operator free rein to make carriage decisions based on content.

D. The Commission Should Allow Leased Access Programmers to Resell Time Without Any Restrictions.

The Commission should freely permit resale of leased access time both because it would encourage the development of leased access, and because there is no good reason to ban it. If a programmer is prepared to enter into a contract with the operator and pay a leased access fee, it should make no difference to the operator how that programmer obtains programming or what its arrangements with its program producers are, so long as the programmer pays the fee and complies with all other obligations under its agreement. Such programmers may act as brokers, bringing together packages of programming more efficiently than the operator, because they are devoted to that goal full time, whereas operators devote little or no staff to promoting leased access.

V. THE PROPOSED AMENDMENT TO THE DISPUTE RESOLUTION MECHANISM ERECTS A NEW BARRIER TO ENTRY AND WILL AID RECALCITRANT OPERATORS.

The FNPRM proposes to amend its dispute resolution procedures by prohibiting programmers from filing any complaints regarding the calculation of an operator's maximum rate until an independent accountant has reviewed the calculations. If the operator and the programmer cannot agree on an accountant, the operator would have the right to select the

accountant, and the accountant would then prepare a report within 60 days of the programmer's request. Only then could the leased access programmer seek relief at the Commission.

This proposal suffers from several defects. As an initial matter, it erects an entirely new barrier to entry for leased access programmers, forcing them to spend additional money -- and incur further delays -- before they can even petition the Commission. The proposal also ignores the large discrepancy in market power between the cable operator and the leased access programmer. The proposal also represents an abdication of the Commission's responsibility as a regulatory agency.

The only effect of using an accountant for this purpose will be to make the process more time-consuming and expensive -- two factors that work to the operator's advantage and the programmer's disadvantage. Consequently, the FNPRM's proposed procedure will make it even harder for leased access programmers to get rate information. Time and money are both on the operator's side, and the process would only give operators further incentive to withhold information. The Commission must recognize that the operator has full control of the facts and full control of the channel and no incentive to cooperate. Under those circumstances, the proposal is doomed to failure.

Suppose, for example, that a programmer asks an operator for rates. Currently, programmers face a struggle merely to get rate information, much less accurate rate information, because the only way they can get it from an uncooperative operator is to file a petition, and filing petitions costs money. Operators routinely delay and obfuscate, refusing to provide rate information, often providing inaccurate or misleading information when they

do. While the new rules issued with the FNPRM admirably set a seven-day limit to resolve this problem, the operator's general incentive to delay will not change under the new proposal, and the time limit does nothing to ensure that operators calculate their rates strictly in accordance with the new rules.

For instance, once the programmer has the rate information, it must review and determine whether it is accurate. Since the programmer has no right under the Commission's rules to obtain information that would justify the calculations, the programmer has to presume that the rates should be reviewed by an accountant. But when the programmer submits a request for review to the operator, the operator has no incentive to agree on the identity of the accountant -- indeed, the operator has an incentive to delay to use up as much of the sixty-day review period as possible. Only the programmer has an incentive to agree to anything, because the programmer needs the information, and has only 60 days to get it. Thus, operators will be rewarded for refusing to cooperate, and programmers will, in the end, have little choice but to agree to the accountant named by the operator.

Once this battle has been resolved, the operator still will have no incentive to provide the accountant with all the information it needs. And if the accountant is not familiar with the substance of the Commission's rules and policies (a likely possibility), the accountant may overlook key information, or even compute the rates incorrectly. Even if the accountant asks for all the right information, how will the Commission deal with cases in which the operator claims certain material is proprietary or confidential and refuses to provide it to the accountant?

Next, how is the accountant to be paid? As a practical matter, this issue also presents the leased access programmer with an inherently unpalatable -- and unfair -- dilemma. Either the programmer must pay some or all of the cost -- creating an entirely new financial barrier as a pre-condition just to file a petition with the Commission -- or the operator may pay, in which case it is difficult to believe that the accountant could be truly "independent" of the party paying its bills.

And yet, under no circumstances should a programmer have to pay for information that the operator is required to provide by law. The Commission should not require programmers to pay additional costs just as an admission ticket to get what they are entitled to by law. This is especially the case because, under any system, the operator is the only party with all the information needed to verify the rates. For this reason, our presumptive nominal rate approach is far preferable; it puts the burden of proof of the accuracy and reasonableness of the rates on the operator where it belongs, and does not impose any additional costs on the programmer.

Therefore, the proposed amendments to the dispute resolution mechanism are wholly inadequate and should not be adopted at all. They could be marginally improved if the leased access programmer could select an accountant on its own, and if the cable operator were required to pay the cost of review. This would give the operator at least some incentive to comply, because delay would only increase the accountant's bill. It would also be fair, because it would impose the costs on the party that is in control of all the information, that is best able to pay, and that is least likely to want to cooperate. This would still be only a marginal improvement, however, because it would delay a final decision,

would make the accountant beholden to the operator and thus not truly independent, and would very likely not obviate the need for an appeal to the Commission.[5]

In summary, what the Commission ought to do is adopt our presumptive nominal rate approach, provide for clear and strong penalties on operators that do not abide by the Commission's rules, and then make prompt enforcement a priority for the Cable Services Bureau. If operators believe the Commission is serious about enforcing the rules, operators will comply. Otherwise, they will continue to skirt them.

Conclusion

The Commission should fulfill its responsibilities under the Cable Act by ensuring the development of leased access as a viable alternative to the exclusive editorial control of cable operators. The Commission should require operators to charge no more than a nominal amount, unless the operator can establish that its actual costs justify a higher rate. The

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[5] The FNPRM also suggests the use of Alternative Dispute Resolution. If this suggestion was included for any reason other than to comply with Executive Order 12988, it unfortunately illustrates the Commission's misunderstanding of the difficulties facing leased access programmers. Cable operators are not interested in resolving disputes with leased access programmers. In all but a handful of cases they want to force existing leased access programmers off their systems, and discourage new potential programmers from trying to get on their systems. ADR will be useless under these circumstances. The simple truth is that the only thing the operators fear is effective Commission regulation.

Commission should also take definite steps to ensure leased access programmers are not required to comply with burdensome and unreasonable terms and conditions of carriage.

Respectfully submitted.

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